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Reading Justice Brennan: Is There a “Right” to Dissent?

by
RORY K. LITTLE*

Speaking “In Defense of Dissents” toward the end of his career, Justice Brennan closed with an assertion that a “right to dissent” is “one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births.”¹ Having written approximately 471 substantive dissenting opinions in his 34 Terms on the Court² (and over 2,300 total dissents if you include his death penalty and other dissents from stays or denials of certiorari³), Justice

* Assoc. Prof., Hastings College of the Law. I had the privilege and pleasure of clerking for Justice Brennan during the 1984-85 Term. I am grateful for comments, if not endorsement, from Vik Amar, Ash Bhagwat, Evan Caminker, Joseph Grodin, Ed Hartnett, Calvin Massey and Josh Rosenkranz, and for assistance from Steven Brundage, Katy Hull, and Beverly Taylor.

1. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 438 (1986) (delivered as the Tobriner lecture at University of California, Hastings College of the Law in November 1985).

2. While Justice Brennan was prodigious by any measure, precise counts of his opinions are surprisingly hard to come by. In a tributary book published shortly before Justice Brennan died in 1997, both he and Justice Souter (who assumed Justice Brennan’s seat on the Supreme Court in 1990) reported that Justice Brennan had issued 1,360 opinions of various kinds during his tenure. See REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 17, 301 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997). Justice Brennan broke this down to 461 majority opinions, 425 dissents, and 474 “other opinions.” *Id.* at 17. My own review of 34 volumes of the *Harvard Law Review*, which annually publishes Supreme Court statistics, from 1957 through 1990 yields slightly different numbers (counting only once those opinions that were intended to apply to more than one case): 471 dissenting opinions, 452 majorities, and 219 concurrences, for a total of 1,142 merits opinions. See 70 HARV. L. REV. 101, tbl. IV (1957) through 104 HARV. L. REV. 359, tbl. I (1990). This accords at least roughly with Justice Souter’s own breakdown. See David H. Souter, *Justice Brennan’s Place in Legal History*, in REASON AND PASSION, *supra*, at 301 (“[A]fter subtracting per curiams, chambers opinions, and dissents from denial of certiorari, there are still nearly 1,200 [Brennan opinions] left.”).

3. A computerized search of the Lexis Supreme Court library for “Dissentby (Brennan)” yields 2,346 case citations (which must encompass dissents from denials of certiorari). “Concurby (Brennan)” yields 288 citations and “Opinionby (Brennan)” yields 478 citations.

Brennan likely thought this proposition so obvious as to need no separate defense, and it was accompanied by no elaboration. But one might ask—and I imagine it is a question that would have intrigued Justice Brennan—what foundation exists for a claimed “right” of judges to publish dissenting opinions? Scant analysis of the claim exists; it is either summarily asserted or denied by those who address the general topic of dissents.⁴

Today the *Hastings Law Journal* reprints Justice Brennan’s “In Defense of Dissents” essay as one of the most prominent pieces published in its first 50 years. Well into his “dissenting” period by 1985,⁵ Justice Brennan sought to provide his principled rationale for why, and when, a judge may properly dissent. His essay retains complete vitality today as the most comprehensive and succinct assemblage of justifications for dissenting judicial opinions. Below, in Part I, I provide a bit more detail regarding Justice Brennan and his opinions, and urge you to read his essay. Then in Part II, I use his

4. Prior authorities that even address the question are scarce. Karl ZoBell, in his 1959 survey of Supreme Court dissenting opinions, wrote that “a body of historical precedent . . . clearly establishes the right of the individual Justices” to dissent. Karl M. ZoBell, *Division of Opinion in The Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 209 (1959). Yet as Professor Art Leff, late of Yale, used to instruct, the word “clearly” usually means “I have no authority for what I am about to say,” and ZoBell does not further support his claim. Accord, Michael Mello, *Adhering To Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as Punishment*, 22 FLA. ST. U. L. REV. 591, 685 (1995) (“[t]hinking of judges as conscientious objectors . . . they have a legally protected right to dissent. In fact, everyone knows they can dissent . . .”); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 254-55 (by implication); see also Justice Story, *infra* note 53. In a related vein, over 40 years ago Judge Michael Musmanno of the Pennsylvania Supreme Court published his arguments for why the state’s chief justice could not lawfully bar publication of a Musmanno dissent, after his chief justice had prevailed with such an order. See Hon. Michael A. Musmanno, *Dissenting Opinions*, 60 DICK. L. REV. 139 (1956); *Musmanno v. Eldridge*, 114 A.2d 511 (Pa. 1955) (affirming denial of mandamus seeking to compel the official reporter to print his dissent). Conversely, in her very helpful Note providing a history of early Supreme Court dissents, Meredith Kolsky opines in a footnote without elaboration that “judges and Justices probably do not enjoy a constitutional right to dissent.” Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2086 n.89 (1995). See also Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996) (justifying the “practice of dissent” in the Supreme Court without any “rights” analysis).

5. According to the *Harvard Law Review*’s statistics, see *supra* note 2, Justice Brennan published only 60 substantive dissents in his first 14 Terms on the Court. Thus in the first 41% of his time on the Court, Justice Brennan filed less than 13% of his total 471 dissents. Indeed, during one halcyon period of the Warren Court’s dominance, Justice Brennan filed only six dissents over five Terms (1965-1969), and filed none at all in 1968. However, with the retirement of Warren in 1969, and the appointments of Chief Justice Burger in 1969, Justice Blackmun in 1970, and Justices Powell and Rehnquist in 1971, Justice Brennan quickly went from over a decade of single-digit dissenting Terms to filing a high of 29 dissents in Oct. Term 1972 (matched only once again, in Oct. Term 1983).

essay as stimulus to consider, briefly, the separate question that Justice Brennan never expressly addressed: are there constitutional foundations for a judicial *right* to dissent?

I.

Since Justice Brennan retired in June 1990 and passed from our midst in 1997, many others have penned his tributes.⁶ His pithy essay, originally delivered as the Tobriner lecture at Hastings in 1985 and barely 12 pages long, has rightfully been cited regularly since it was published.⁷ It will have lasting contemporary relevance for as long as we depend on written judicial opinions to guide our polity (and do not prohibit judges from dissenting).

Over the long course of his Supreme Court career, however, Justice Brennan's forte was not really dissent but rather "counting to five"—assembling majorities of the Court's nine Justices.⁸ Moreover, his talents were often showcased not in published opinions but in persuasive internal memos and drafts, written to other Justices to whom the opinions were formally assigned.⁹ Finally, as the Senior Associate Justice for almost 15 years,¹⁰ Justice Brennan was a master

6. See, e.g., REASON AND PASSION, *supra* note 2; *Memorial Dedication to Justice William J. Brennan, Jr.*, 31 LOY. L.A. L. REV. 723-74 (1998) (nine commentators); Symposium, *Reason, Passion & the Progress of Law: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan*, 33 HARV. C.R.-C.L. L. REV. 313 (1998) (symposium summary and three commentators); Evan H. Caminker, *Morning Coffee with Justice Brennan*, 7 B.U. PUB. INT. L.J. 3 (1998); *Tribute to Justice William J. Brennan, Jr.*, 26 HARV. C.R.-C.L. L. REV. 1 (1991) (two commentators); *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1 (1990) (six commentators). In fact, tributes to Justice Brennan preceded his retirement by over two decades. See 80 HARV. L. REV. 1 (1966) (four tributes assessing Justice Brennan's first decade on the Court).

7. See, e.g., Social Sciences Citation Index.

8. See, e.g., Justice David Souter, *Eulogy at the Funeral Mass of Justice Brennan*, 7 B.U. PUB. INT. L.J. 1, 2 (1998) ("While I was with him, he might tell me some things that were true, like how to count to five."); Kathleen M. Sullivan, *A Thousand Opinions, One Voice*, N. Y. TIMES, July 25, 1997, at A29; Fred Woocher, *Tribute to Justice Brennan*, 31 LOY. L.A. L. REV. 749, 751 (1998).

9. In his eminently readable biography, Kim Eisler recounts the details of how Justice Blackmun's majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), reflected both structural and substantive reliance on a memorandum written to him by Justice Brennan almost two years earlier when the case was first argued. KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* 224-33 (1993). Similarly, scholars have noted that it was Justice Brennan's internal redraft of Chief Justice Warren's majority opinion that enabled a majority to coalesce in the landmark *Terry v. Ohio* opinion, 392 U.S. 1 (1967). See Symposium, 72 ST. JOHN'S L. REV. 721, 821-27, 894-95, 908 (1998) (symposium on *Terry*). See also Souter, *supra* note 2, at 306 ("Scholarship is turning up Brennan authorship and influence in significant opinions that bear no Brennan name.").

10. Justice Douglas retired in November 1975, leaving Justice Brennan junior only to the Chief Justice. See 423 U.S. iii, iv n.1 (1975).

in wielding the assignment power when his majority did not include the Chief Justice—and because the Chiefs during this period were Warren Burger and the “other Bill,” Justice Rehnquist, Justice Brennan was often in the opposite camp. When so positioned, Justice Brennan frequently would assign the writing of significant majority opinions to other, less certain Justices, in order (hopefully) to keep them in the fold and tie them to the majority’s result and rationale in future cases.

Justice Brennan’s was the art of compromise and behind the scenes influence, not vitriolic dissent—arm-hugging, not twisting. When other Justices requested changes in order to join his opinions, Justice Brennan typically would quickly agree to make them (at times to the consternation of his over-involved law clerks). Generally credited as the “architect” of many pathbreaking Warren Court opinions, Justice Brennan was also the architect of many surprising majority opinions in the more conservative Burger-Rehnquist courts.¹¹ When his deep influence within the Warren Court is evaluated together with his continued ability to assemble majorities for another twenty-one years, Justice Brennan is easily credited as being “the most influential Justice of his era,” indeed, of this century.¹²

When writing in dissent, as was increasingly the case in the last half of his tenure,¹³ Justice Brennan was neither caustic nor trivial. As his long-time friend Judge Abner Mikva has noted, “he knew how to disagree without being disagreeable.”¹⁴ Defending dissents in 1985, Justice Brennan wisely proclaimed that “[d]issent for its own sake has no value, and can threaten the collegiality of the bench.”¹⁵ While Justice Brennan surely wrote some great dissents,¹⁶ he was not

11. For just a few examples, see EISLER, *supra* note 9, at 223-33 (*Roe v. Wade*, 1973), 243 (*Furman v. Georgia*, 1972), 251-55 (*Nixon*, 1974), 261-63 (*Bakke*, 1976), 275-77 (*Texas v. Johnson*, 1989), 279-80 (*Metro Broadcasting*, 1990).

12. Sullivan, *supra* note 8 at 829; accord, EISLER, *supra* note 9, at 13. Justice Scalia, no ideological companion of Justice Brennan, endorsed this evaluation after Justice Brennan retired. See *All Things Considered* (Nat'l Pub. Radio, July 24, 1997) (available in LEXIS, Nexis Library, Transcript No. 97072410-212, at *2) (Justice Scalia: “Bill Brennan is probably the most influential [J]ustice of the century . . . [although] not in a direction that I happen to agree with”).

13. Fully 352 of Justice Brennan’s 471 substantive dissents, see *supra* note 2, or 75%, were filed in the last half of his Supreme Court career (1974-1990). See also *supra* note 5.

14. Abner J. Mikva, *Reason, Passion & the Progress of Law: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan*, 33 HARV. C.R.-C.L. L. REV. 325, 331 (1998).

15. Brennan, *supra* note 1, at 435.

16. Justice Brennan gave some indication of his independence and courage as a dissenter early on, when he issued his first merits dissent two months prior to the Senate’s confirmation of his recess appointment. See *La Buy v. Howes Leather Co.*, 352 U.S. 249,

a "Great Dissenter." We can leave that dubious sobriquet to other Justices—Harlan, Douglas, Marshall, and Scalia—who sat during Justice Brennan's remarkable tenure.¹⁷ To my mind, the consistently cordial, if at times deeply dismayed, character of Justice Brennan's dissents is to his lasting credit.

Anyone interested in judicial dissents must read his wonderful essay, written by a knowledgeable insider and explaining why dissents "serve a very important purpose."¹⁸ "Dissents contribute to the integrity of the [judicial] process" and "to the marketplace of competing ideas."¹⁹ Indeed, we accept and honor dissenting opinions because they sometimes turn out to be *right*, often enough to remind us unceasingly of the human frailty of the judicial process. Dissent, therefore, when strongly felt and coolly reasoned, is a judicial "obligation," as well as a right—and it is "very hard work" that judges "cannot shirk."²⁰ Justice Brennan's essay defends dissents in words that are hardly controversial and, one suspects, command a timeless majority regardless of ideology.

II.

Rather than add more paper to the blizzard of praise that is rightfully Justice Brennan's, I now want to turn, if only briefly, to a question I am sure would have intrigued him: is there a *right* for judges to dissent? Not just to express their disagreement in newspaper editorials, law reviews, or from soapboxes—for surely judges retain a general First Amendment right of expression no less than other citizens—but rather a "right to issue dissenting opinions,"

260 (1957); 352 U.S. at iv n.3. Some of my personal favorites among Justice Brennan's dissents are *Cruzan*, *McKlesky*, *Teague*, *Elstad*, *Atkins v. Parker*, *Gregg v. Georgia*, and *National League of Cities v. Usery*. See also Harry A. Blackmun, *A Tribute to Mr. Justice Brennan*, 26 HARV. C.R.-C.L. L. REV. 1, 3-4 (1991) (noting seven instances in which positions advocated in Brennan's dissents were later adopted by the Court, or by Congress, or in proposed legislation).

17. Justice Douglas, for example, asserted that "[t]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court." WILLIAM O. DOUGLAS, *AMERICA CHALLENGED* 4 (1960). Remarkably, Justice Brennan sat with one-fifth—22 of 108—of all the Justices who have ever served on the Supreme Court. See REASON AND PASSION, *supra* note 2, at 17. Only five Justices in the Court's history served longer than Justice Brennan (John Marshall, Stephen Field, Hugo Black, William O. Douglas, and John Marshall Harlan), and four of these five outlasted him only by a few weeks or months, all leaving the bench after 34 years. Justice Douglas served 36 years, although some have questioned his alertness in his last few years. See Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES, July 25, 1997, at A1; EISLER, *supra* note 9, at 257.

18. Brennan, *supra* n.1, at 437.

19. *Id.* at 435.

20. *Id.* at 438.

written explanations of their rationale for disagreement that must be published in company with the official majority view?

As I discovered in preparing this essay, while many concerned legal observers "want" there to be such a right, few are prepared to defend it as constitutionally required. It may help to subdivide the concept. Judicial dissent can be broken into three distinct components: expressing disagreement to one's colleagues privately; having one's disagreement with the majority's opinion publicly noted; and issuing a written dissenting opinion in company with the majority's. I wish to consider here a "complete" judicial right to dissent, one that encompasses all three components: private voting, public non-joinder, and written dissenting opinions. I suggest below that the first two components are supported by the First Amendment. The third component, however—a right to issue dissenting opinions—must be founded on a constitutional conception of Article III "courts" and "judges," because the First Amendment likely cannot carry the right that far.

A. The Historical Tradition

The American judicial practice of issuing separate, disagreeing opinions has a strong historical claim.²¹ Such opinions have been part of the judicial scene in this country since before its founding. Early American judges adopted the British tradition of seriatim opinion writing, where each member of an appellate court presented his views (there were then no "hers") in a separate writing, whether in sync with the majority or not.²² As Pennsylvania Supreme Court Justice Jacob Rush wrote in 1786, "However disposed to concur with my Brethren in this cause, I have not been able to do it. Unanimity in courts of justice, though a very desirable object, ought never to be

21. See generally, Kolsky, *supra* note 4, at 2072-73; ZoBell, *supra* note 4, at 190-92; DONALD E. LIVELY, *FORESHADOWS OF THE LAW: SUPREME COURT DISSENTS AND CONSTITUTIONAL DEVELOPMENT* xxii-xxvi (1992); PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT* 20-21 (1969); see also *infra* notes 25 and 74. Worldwide, of course, the practice of judicial dissent is "far from universal," and it is not permitted in many of Europe's civil law systems. See Stack, *supra* note 4, at 2235 n.2 (collecting authorities).

22. ZoBell, *supra* note 4, at 190-91. ZoBell reminds us that Eighteenth century judicial tribunals were quite different than today's, so that no historical analogies are contemporaneously perfect. See *id.* at 192. For example, prior to independence the final appeal from colonial courts was to England's Privy Council, a fundamentally Executive, rather than judicial, body. See *id.* at 187-89. In addition, the institution of government-paid "reporters" obligated to publish any judicial opinions did not arise until the 1800s. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1347 (1985). Thus the claim that a dissenting opinion must be published rests, to some extent, on a post-Framing change in practice. The right to *issue* such an opinion, however, does not.

attained at the expense of sacrificing the judgment.”²³ Although published dissents were reluctant and apparently uncommon, they were accepted by early American courts when issued.²⁴ As Justice Iredell wrote in what has been identified as the earliest Supreme Court dissent, “It is my misfortune to dissent from the opinions entertained by the rest of the court . . . but I am bound to decide, according to the dictates of my own judgment.”²⁵

History, therefore, might by itself sufficiently support a claimed judicial right to dissent. Constitutional originalists might even find the historical argument dispositive when determining the core essentials of an Article III “judge.”²⁶ At the very least, history can aid our understanding of the contemporaneous meaning that Article III and the First Amendment might be accorded. But what more might there be to a constitutional foundation for a judicial right to dissent?

B. The Right to Dissent—A Hypothetical Inquiry

The absence of any published scholarly opinion on the topic has led me to take some informal polls. Most people I have asked initially respond “of course there is a right to dissent—or at least there *should* be.” They then ask what causes me to ask such an odd question: is there some current, serious threat to the practice of dissenting opinions? The answer, thankfully, is no (although there are some historical precedents²⁷ and Justice Kline’s case, discussed

23. *Purviance v. Angus*, 1 U.S. (1 Dall.) 193, 202 (1830 ed.) (Pa. High Ct. of Err. & App. 1786) (3d ed. 1830) (Rush, J. dissenting).

24. Noted comparative law scholar Professor Kurt Nadelman explained in 1959 that although there is no practice of public dissents in some other countries, in the United States “[t]he right to announce a dissent was never questioned” even in the Supreme Court’s earliest era. Kurt H. Nadelman, *The Judicial Dissent: Publication Versus Secrecy*, in *CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE – SELECTED ESSAYS* 363, 367 (1972).

25. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 415 (1793) (Iredell, J., dissenting). Professor Michael Mello reminds us that because judicial opinions were delivered orally at this time, and the reporting of court opinions was unofficial and somewhat haphazard, we cannot be certain that we have a full and accurate record of all such opinions. See Mello, *supra* note 4, at 606. See also *supra* note 22.

26. See *infra* notes 69-72 and accompanying text; *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358 (1995) (Thomas, J., concurring).

27. In 1923, former Pennsylvania Supreme Court Justice Alex Simpson reported that in 1845, Pennsylvania enacted a statute which, after establishing an official state supreme court reporter of decisions, went on to direct that “no minority opinions of the said [supreme] court shall be published by said reporter.” Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 208 (1923) (alteration in the original) (citation omitted). See also Musmanno, *supra* note 4. Justice Simpson also reported that in 1627, and continued in an 1833 Act, the British Privy Council directed that “[w]hen the business [of that tribunal] is to be carried according to the most voices, no publication is afterwards to be made by any man, how the particular voices and opinions went.” *Id.* at 207. Karl

below in section C, raises some eyebrows). We all then quickly agree that permitting judges to dissent is wise policy, whether or not constitutionally required.

But strong desire and good policy cannot substitute for analysis of whether the Constitution can bear the weight of dissent as a *right*. It is a bold claim to assert that judges have a "right" to issue dissenting opinions. I seek here only to explore, rather than to establish, the proposition. But consider the following hypothetical:

After reciting undoubtedly "rational" findings regarding (1) the expenditure of scarce resources involved in publishing dissents, (2) the distraction of judges from their already over-burdened duties that the preparation of dissents necessarily involves, (3) the destabilizing effect that public expression of dissenting views can have on the law and on judicial institutions,²⁸ and (4) the alternative forums (newspapers, law journals, soapboxes) that are readily available to judges to publicize strongly held dissenting views,²⁹ Congress passes and the President signs a statute something like the following:

No judge shall be permitted to issue, and no governmental resources may be used to publish, opinions or other written memoranda that dissent from legitimately decided majority judgments issued by a court on which the judge sits.

Would such a statute be lawful? Or is there a constitutional right to dissent that would trump it?³⁰

ZoBell, however, explains that this compelled unanimity in the Privy Council resulted from its essentially executive-branch character, which greatly distinguishes it from a true ban on *judicial* dissents. See ZoBell, *supra* note 4, at 188.

28. This view was expressed perhaps most vehemently by Justice Edward White, notably in dissent: "The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort." *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 608 (1895) (White, J., dissenting). See also LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958); CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67 (1928). See *infra* notes 55 and 57. It is ironic how often criticisms of dissent appear in dissenting opinions—a rather obvious, it would seem, psychological disarming technique. See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("I think it is useless and undesirable, as a rule, to . . . dissent . . .").

29. See e.g., Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process"*, 74 N.Y.U. L. REV. 313 (1999); John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011 (1993).

30. Of course, so far as I am aware, no such federal statute has ever been proposed, and because it is so unlikely it may seem even a poor law school hypothetical. But see *supra* note 27. Here, as Professor Gunther has noted in related context, "[t]he oft-heard admonition about the distinction between constitutionality and wisdom bears special emphasis." Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984). One might speculate that the lack of articulated rationales for the right to dissent, see *supra*

Two constitutional arguments, at least, present themselves in favor of the proposition. First, the First Amendment always comes to mind when some sort of expression is being regulated. Yet while freedom of speech may well support part of the claim—that judges have the right to privately express and publicly note that they dissent from a majority judgement or opinion—it may well not support the full-blown claim that dissenting judges have a right to issue accompanying opinions that explain their dissenting views. Second, however, the Constitution employs the words “Courts” and “Judges” to describe actors in the judicial branch.³¹ It can be argued, à la Professor Hart,³² that a right to issue dissenting opinions is part of an irreducible core meaning of these terms, without which the constitutional actor is being unconstitutionally constrained. This position contends that a court cannot be a “Court” nor a judge a “Judge” in the constitutional sense without including a right to issue dissenting opinions.³³

One can of course imagine Justice Brennan’s immediate reaction to the hypothetical statute. As noted, he spoke in his 1985 essay of the “cherished right to dissent,” and in one of his most controversial “count to five” majority opinions—*Texas v. Johnson*, popularly known as the “flag burning” case, written in his next-to-last term—Justice Brennan wrote that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”³⁴

note 4, has resulted from uniform agreement that a serious threat to the right is unwise and implausible. But see *infra* notes 36-46 and accompanying text (discussing current disciplinary proceedings against dissenting California appellate Justice Kline).

31. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall . . .”) (emphasis added). Needless to say, “be permitted to issue dissenting opinions” is not an explicit part of this omitted constitutional “shall” clause.

32. See *infra* text accompanying note 66.

33. There may also be a statutory argument, at least for the U.S. Supreme Court, although the argument of course would not overcome a subsequent congressional act such as that hypothesized in the text. Title 28 U.S.C. § 411 (1994) directs that “[t]he decisions of the Supreme Court of the United States shall be printed, bound, and distributed.” An argument can be made that the court’s “decisions” must include all prepared opinions, even of dissenters. When the Pennsylvania Supreme Court refused to publish one of its justice’s dissents (which had been delivered late to the reporter), the dissenting justice published a law review article noting this statutory point and arguing that “[t]he Dissenting Opinions of the United States Supreme Court have always been regarded as part of its official decisions.” Musmanno, *supra* note 4, at 139.

34. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Whether a ban on all dissenting opinions is “content based” or “content neutral” presents a rather nice constitutional question. One could say that such a ban is based on the very fact that the *content* of a

In this he echoed his famous majority of a quarter century earlier in *New York Times v. Sullivan*, which endorsed America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."³⁵ While the practice of dissenting opinions benefited from explication in Justice Brennan's "Dissents" essay, the "right to dissent" itself was, for Justice Brennan, too obvious to debate.

But while Justice Brennan might have needed no persuasion, it may be instructive for the more skeptical to sketch—or, in light of the necessary brevity of an introductory essay, to suggest a caricature of the sketch—constitutional arguments that might support a full right of judicial dissent. The question is of current interest in California, because a respected state appellate judge, Presiding Justice J. Anthony Kline, has recently faced judicial disciplinary charges of "willful misconduct in office" for having issued a dissent from application of his state supreme court's law.³⁶

C. The Kline Proceedings

In a 1997 appeal which the parties had agreed to resolve by a "stipulated reversal" (that is, a settlement of the case conditioned on an order vacating the adverse judgment below), Justice Kline refused to join the two-judge majority granting the dismissal and reversal, although he acknowledged that the California Supreme Court had settled the legality of such stipulated reversals in a prior decision.³⁷ In his published dissent, Justice Kline noted that the U.S. Supreme Court had subsequently ruled contrarily to the California Supreme Court (but under federal law)³⁸ and that it was his "deeply felt

dissenting opinion is disagreeable to the majority view. Yet the ban would apply to all dissents, *regardless* of their content—that is, it would not matter which five-Justice bloc "won." Nevertheless, it is the expression of disagreement that would seem to underlie a ban on dissents. "[B]y any common sense understanding of the term, the ban . . . is 'content based.'" *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). Whether or not current doctrine requires strict scrutiny (and whether in fact the categorization decision really makes a difference in result, as opposed to being result-driven), it seems likely that Justice Brennan would so conclude. *See Boos v. Barry*, 485 U.S. 312, 334 (1988) (Brennan, J., concurring) (rejecting a "secondary effects" test to recast speech regulations as content neutral).

35. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

36. *See Inquiry Concerning Justice J. Anthony Kline, No. 151*, California Commission on Judicial Performance, Notice of Formal Proceedings 1 (June 30, 1998) [hereinafter *Inquiry*].

37. *See Morrow v. Hood Communications, Inc.*, 69 Cal. Rptr. 2d 489, 491 (Cal. Ct. App. 1997) (Kline, J., dissenting) (noting that *Neary v. Regents of Univ. of Calif.*, 834 P.2d 119 (Cal. 1992) "requires that the motion before us be granted").

38. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994) (ruling unanimously that, as a matter of equitable principles, while parties may of course

opinion" that the California Supreme Court's prior ruling was not just "analytically flawed and empirically unjustified" but also "destructive of judicial institutions."³⁹ He wrote that he could not "as a matter of conscience" apply the superior court's ruling, and stated that this was one of the "rare instances in which the judge of an inferior court can properly refuse to acquiesce in the precedent established by a court of superior jurisdiction."⁴⁰ Six months later, the California Commission on Judicial Performance, a state judicial disciplinary body, filed a formal notice of possible discipline against Justice Kline, based upon his dissent.⁴¹

It is important to note what Justice Kline did *not* do. First, he did not author a majority opinion which actually refused to apply a higher precedent—the parties in fact obtained the stipulated reversal to which they were entitled under state law. Second, Justice Kline did not refuse to implement a direct order from a higher court, nor did he repeatedly dissent once the California Supreme Court made clear that it would not reconsider its stipulated-reversal doctrine.⁴² The

"settle" an appeal, they are not entitled to vacatur of the judgment below absent demonstration of "entitlement" to such an "extraordinary remedy"). See also *Lundquist v. Reusser*, 875 P.2d 1279, 1283 n.8 (Cal. 1994) (declining to dismiss an appeal, despite the parties' settlement, because the issues presented were of "continuing public importance"). Notably, on September 29, 1999, California's Governor signed legislation that prohibits "stipulated reversals" unless the appellate court finds that vacatur does not harm public and non-party interests, effectively overriding *Neary*. See *Davis Signs Ban On 'Stipulated Reversals'*, THE DAILY JOURNAL, Sept. 30, 1999, at A3.

39. 69 Cal. Rptr. 2d at 491.

40. *Id.* at 491, 490 (citing Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) and Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041 (1987)).

41. The charges were subsequently dismissed, although not until one year and substantial costs later. See *infra* note 46. In support of its charges, the Judicial Performance Commission has cited the California Code of Judicial Ethics, Canons 2A (refusal to comply with the law) and 3B (2) (refusal to follow established law). In response, Justice Kline not only denied these claims, but also relied (*inter alia*) on Canon 1 of the same code, describing the judicial duty to "uphold the integrity and independence of the judiciary." Verified Answer, *Inquiry Concerning Justice J. Anthony Kline*, No. 151, at 3 ¶ 7 (Sept. 4, 1998). It is neither the goal nor the burden of this Essay to opine on the validity of these claims.

42. In fact, Justice Kline identified significant intervening reasons to believe that his Supreme Court might, or should, change its view. See *supra* text and accompanying notes 38 and 39. However, when the California Supreme Court took up the *Morrow* case on its own motion (since, by virtue of the stipulated reversal, no dissatisfied party remained to appeal), it voted 5-2 not to grant review. Once the supreme court made it clear that it was not prepared to reexamine its precedent, Justice Kline recused himself from future stipulated reversal cases. See Verified Answer, *supra* note 41, at 6 ¶ 17.

In his dissent, Justice Kline also stated that he "will refuse to apply the *Neary* rule" in future cases, although he would "of course comply with an order of the California Supreme Court to grant a particular request for a stipulated reversal, a purely ministerial act." 59 Cal. App. 4th at 930. The California Commission on Judicial Performance recited

legitimate "hierarchical precedent" concerns that such action might evoke are not unavoidably presented by a lone dissent, devoid of power or effect other than its persuasive content. I do not believe a "right to dissent" must also necessarily imply a "right to defy precedent." The concepts are separable, and the arguments that Professor Evan Caminker has detailed to deny the latter claim persuasively need not also deny a right simply to issue an opinion disagreeing with precedent.⁴³

Notably, the other two judges on Justice Kline's intermediate three-judge appellate panel issued a majority opinion in which they granted the stipulated reversal but also "respectfully stat[ed]" their *agreement* with Justice Kline's substantive views, and urged that the case presented an "appropriate vehicle through which the Supreme Court should reconsider and repudiate the doctrine" previously adopted.⁴⁴ Thus these judges also stated their disagreement with the higher court's earlier decision. Yet they were not charged with judicial misconduct. Justice Kline, therefore, appears to have faced discipline solely for the chosen *vehicle* of his expression of disagreement: a dissenting opinion, rather than a concurrence (or a recusal).⁴⁵ Although the charges against Justice Klein have recently been dismissed, two arguments, sketched below, suggest that he may have had constitutional defenses.⁴⁶

D. The First Amendment Argument

The First Amendment ⁴⁷ generally prohibits government-coerced

this promise of continued refusal as part of the charges in its Notice of Formal Proceedings, *see* note 36, *supra*, at 2. However, because Justice Kline has in fact recused himself from all such subsequent cases, the issue of a repeated refusal to follow precedent was not actually before the Commission in his case.

43. *See* Caminker, *supra* note 40, at 856-65. *See also infra* notes 62-64 and accompanying text. Professor Caminker's article addresses a duty of "inferior" courts to follow precedent. Thus Justice Brennan, who sat as an equal on the highest court in the land, could repeatedly dissent from the majority's views on precedent (for example, regarding the death penalty), without invoking the hierarchical arguments that might forbid such a practice by an intermediate appellate or trial judge. *See* Brennan, *supra* note 1, at 437.

44. 69 Cal. Rptr. 2d at 490.

45. Thus the issue of "content neutral" versus "content based" is starkly presented (*see supra* note 34): Justice Kline found himself in hot water for the manner of his disagreement, not the disagreement itself. *See Inquiry, supra* note 36, at 2.

46. As this essay went to press, the California Commission dismissed the charges against Justice Klein, noting (consistent with this essay) that judges "must be able" to creatively express disagreement "free from fear of discipline for the free expression of their ideas." *See* Decision and Order of Dismissal at 2, *Inquiry Concerning Justice J. Anthony Kline*, No. 151 (Cal. Comm'n on Jud. Performance, Aug. 19, 1999).

47. Which, it bears reminding, provides that "Congress shall make no law... abridging the freedom of speech..." By virtue of the due process clause in the

statements of belief. Justice Jackson's poetry in *Barnette* has withstood the test of over half a century of polarized political applications: "If there is any fixed star in our constitutional constellation, it is that no official . . . can . . . force citizens to confess by word or act their faith" in philosophies that they in fact dispute.⁴⁸ By operation of this principle, the Court has struck down laws requiring loyalty oaths, laws compelling newspapers to print statements written by their editorial opponents, laws requiring drivers to display an offensive motto on their license plates, and laws requiring parade organizers to admit groups they do not wish to support.⁴⁹

Moreover, "compelled speech" and "compelled silence" are held to the same high level of constitutional scrutiny, because (as Justice Brennan wrote for seven Justices in one of those late-career majorities) "'freedom of speech' . . . necessarily compris[es] the decision of both what to say and what *not* to say."⁵⁰ Thus it is generally unconstitutional to compel persons to remain silent when they would rather speak, as well as to compel them to speak ideas they do not believe.⁵¹

Fourteenth Amendment, the First Amendment provides protection against state action as well. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

48. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

49. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking New Hampshire laws prohibiting drivers from obscuring "Live Free or Die" license plate motto); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking Florida law requiring publication of replies from political candidates whom the papers criticized editorially); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (striking requirement that parade organizers admit gay group); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (striking loyalty oath dependent on denying Communist Party membership); *but cf.* *Cole v. Richardson*, 405 U.S. 676 (1972) (upholding oath merely requiring affiant to "uphold and defend" the Constitution).

50. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 797 (1988). See also *Wooley*, 430 U.S. at 714 (The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all.") (citing *Barnette*, 319 U.S. at 645 (Murphy, J., concurring)).

51. This is "generally" true because finding the First Amendment to be implicated does not end constitutional analysis; the government's asserted interests must then be measured and balanced to see if they perhaps outweigh the burden on free speech. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662-64 (1994). When a speech regulation is content-based, it must survive "the most exacting scrutiny," a normally fatal-in-fact strict scrutiny. *Id.* at 642. By contrast, if "unrelated to the content of speech," a regulation is subjected to a more forgiving "intermediate level of scrutiny," *id.*, sometimes described as a lesser "substantial government interest" test for "incidental" burdens involved in time, manner, place restrictions. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See generally, ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 758 (1997). In application, compelled speech or silence has rarely survived these constitutional tests. As the *Barnette* Court put it, "[i]f there are any circumstances which permit an exception, they do not now occur to us." 319 U.S. at 642.

When a multi-judge court publishes an opinion without dissent, the implication is that all the participating judges agree with the judgment (if not with every word of the opinion). If judges who in fact disagree are nevertheless required to remain silent, they are in effect compelled to join a message they in fact dispute.⁵² Whether this is viewed as compelled silence or as compelled "speech-by-conduct" (affirmatively conveying the message "I agree") seems largely moot. Not only does a compelled unanimity rule mislead the parties and the public,⁵³ but it intrudes on the judge's right as a citizen not to be compelled to join in a message with which s/he does not agree. Judges do not lose their constitutional rights when they don their robes. Unless a governmental interest exists so compelling as to override judges' First Amendment interests, one could easily conclude that judges have a First Amendment right to note their dissents publicly.⁵⁴

An overriding governmental interest in banning simple public indications of judicial disagreement is difficult to perceive. Although Learned Hand and others have asserted that judicial non-unanimity can be "disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends,"⁵⁵ the reality is that our Republic and its legal system has

52. This is, of course, an empirical assertion which might, I suppose, be subject to empirical refutation. Professor Ed Hartnett of Seton Hall has reminded me that prior to the 1970 Term, the official U.S. reports did not list who "joined" in the majority opinion. (Perhaps not coincidentally, the practice changed one year after Warren Burger became Chief Justice and Justice Brennan began his dissenting career). It may be that our shared understanding of the meaning of judicial silence has changed over time. My only assertion is that today, not dissenting is generally perceived as "joining." *Accord*, Hon. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42. If this perception were to change, perhaps analysis of a First Amendment "right" to dissent would also change.

53. See *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 350 (1837) (Story, J., dissenting) ("I am of the opinion . . . that upon constitutional questions, the public have a right to know the opinion of every judge who dissents . . . and the reasons of his dissent."). The suggestion that the public may have a separate right to *demand* an explanation of rationale from dissenting judges is an interesting one which I do not further pursue here.

54. *But see infra* text accompanying notes 62-64. It should go without saying, I think, that judges retain a First Amendment right to express their dissenting views privately to their colleagues. Moreover, since which view will be the "majority" cannot be known until all competing views have been considered and voted upon, private expression of disagreeing views is also essential to the judicial function. See Scalia, *supra* note 52, at 41-42. Thus the Article III and First Amendment arguments tend to merge on this question. See also *infra* note 61.

55. LEARNED HAND, *supra* note 28, at 72; see also Justice White, *supra* note 28. Judge Hand actually made this remark not as a critique of dissents, but rather in the course of discussing the power of judicial review. See HAND *supra*, at 72. Thus, while often quoted out of context as powerful criticism of judicial dissent, the remark is in fact far from so direct. Indeed, as Judge Frank Altimari has demonstrated, Judge Hand unflinchingly issued dissenting opinions when he felt it necessary. See Frank X. Altimari, *The Practice*

flourished despite (or perhaps because of) a long and deep tradition of judicial dissents. Indeed, arguments that responsible judicial dissent actually strengthens the overall force of the law and the judiciary seem at least as formidable as arguments to the contrary.⁵⁶ As the unanimous *Barnette* court noted, the First Amendment can be applied "with no fear that freedom to be intellectually . . . contrary will disintegrate the social organization. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."⁵⁷ Applying accepted principles, then, it seems plausible to conclude that the First Amendment prohibits a governmental coercion of judicial silence in the face of a disagreeable majority opinion.

While I have found no reported decision precisely on point, an interesting parallel for this First Amendment argument can be found in a 1989 D.C. Circuit opinion (later vacated as moot), *Clarke v. United States*.⁵⁸ Dissatisfied with a local District of Columbia court decision, Congress passed legislation directing the D.C. city council to enact a specific local law that would have overridden the offending judicial decision.⁵⁹ The city council sued, claiming that by compelling its members to vote oppositely to their desires, the statute violated the legislators' First Amendment speech rights. The district court, and then a panel of the D.C. Circuit, agreed. Because the law "coerced an 'individual . . . expression of opinion,'" and because no strong governmental interest supported abridging the legislators' First Amendment rights, the congressional directive was declared unconstitutional.⁶⁰

of *Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275, 282-83 (1993). Notably, Judge Altman also suggests inferentially that judges may have a right to dissent even in the face of contrary precedent. *Id.* at 278 & n.10.

56. See, e.g., Scalia, *supra* note 52, at 35 ("I have no doubt that . . . announced dissents augment rather than diminish [the Supreme Court's] prestige") and *passim* (giving reasons).

57. *Id.* Former Chief Justice Charles Evans Hughes wrote in the same vein in 1928: "There are those who think it desirable that dissents should not be disclosed as they detract from the force of the judgment. Undoubtedly they do But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable because what must ultimately sustain the court in public confidence is the character and independence of the judges." HUGHES, *supra* note 28, at 67.

58. 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (*en banc*).

59. 886 F.2d at 405-06.

60. *Id.* at 413-17. Congress's interests were deemed insufficient primarily because Congress had authority to modify the law directly, without compelling the D.C. council members to act. See *id.* at 414; *accord, id.* at 418 (Buckley, J., concurring). Because Congress later took this alternative route to amend the D.C. Code before the appellate mandate had issued, the *en banc* D.C. Circuit vacated the panel's opinion as moot. See 915

If the vacated *Clarke* stated good law, the analogy seems clear. Just as Congress may not constitutionally compel legislators to cast (or appear to be casting) votes in which they do not believe, so (the argument goes) judges cannot constitutionally be compelled to cast (or appear to cast) votes from which they actually wish to dissent.⁶¹

Yet, as my colleague Vik Amar has pointed out to me, judges certainly can be compelled to "vote" in a certain way, by way of mandamus, for example, or when a case is remanded by a higher court with clear instructions on how it must be handled below. In such situations, judicial compliance is not merely a "vote" expressing an opinion, but also an *act*.

I think there is great merit in this distinction. It might well be argued that judges have no "right" to dissent when their expression is coupled with a judicial act which denies parties relief in contradiction of clear and unquestionable authority.⁶² Yet the Supreme Court has noted that mandamus, for example, is restricted "to situations where ministerial duties of a nondiscretionary nature are involved."⁶³ Thus

F.2d at 700. See also *Spallone v. United States*, 493 U.S. 265, 274 (1990) (declining to address the First Amendment validity of a court order directing city council members to enact legislation because they previously had agreed to enact the law as part of a consent decree). Justice Brennan's dissent in *Spallone* also did not address the First Amendment question, but rather was premised on legislators "acting outside of their 'sphere of legitimate legislative activity,'" as well as the "scourge of racial politics" shown in the case. *Id.* at 305, 306 (Brennan, J., dissenting) (citation omitted).

61. Notably, the *Clarke* panel also rejected a fallback argument made by the government, that the less restrictive constitutional standard applied to regulation of speech of government employees in *Pickering v. Board of Education*, 391 U.S. 563 (1968), ought to apply to the D.C. council members. The panel characterized this claim as "obviously wrong" because elected lawmakers are not employees but rather "independent legislators . . . presumed to express their personal will when they vote." 886 F.2d at 416. One imagines that whether or not this is true of the D.C. city council, it must surely be true regarding our independent federal judiciary, or the constitutional principles of separation of powers and judicial review are sapped of content. In addition, one imagines that dissenting judicial opinions are, by their very nature and context, speech on "matters of public concern," which is still accorded substantial constitutional protection in the public employment context. See *Rankin v. McPherson*, 483 U.S. 378, 385-87 (1987). "The Court long ago rejected Justice Holmes' approach to the free speech rights of public employees, that '[a policeman] may have a constitutional right to talk politics, but he has no right to be a policeman.'" *Id.* at 395 (Scalia, J., dissenting) (alteration in original) (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892)). It can be argued that the essence of a judge's governmental job is to express opinions about the matters that come before him or her (*but cf.* authorities cited *infra* note 74). A judge is, in effect, paid by the government for his or her independent opinions. Thus again, see *supra* note 54, the Article III and First Amendment arguments tend to coalesce.

62. This, of course, is not what Justice Kline did—his lone dissent was without consequence for the parties, and moreover addressed precedent which was, indeed, open to question. See *supra* notes 38 and 42, and accompanying text.

63. *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958).

the instances in which judges may have an obligation to vote in a particular way, and not cast a dissenting vote (though they might still disagree in a concurrence) might be limited to instances when the relief requested is "nondiscretionary" and the judge's role merely "ministerial," requiring not the least bit of judgement or discretion.⁶⁴ The limiting force of this distinction is important. The "right to dissent" defended here may yet be exercised in the face of precedent when there is reason to question the continued validity of existing authority, or where the judicial act is without consequence on the parties (who otherwise might be said to have a superceding "right" to the relief that the existing legal system rightly or wrongly provides). But there is no right to dissent, even with a plea to the First Amendment, when the requested judicial act is purely ministerial.

Moreover, unless the historical tradition of American judicial dissent is seen as providing additional content to the argument, the First Amendment can support at most only a right for judges to express and publicly *note* their dissents, not an additional right to publish their rationales for dissenting. A simple "Judge Little dissents" would seem sufficient to protect the judge's right not to be forced to join (or appear to join) a distasteful majority opinion. Permitting more than this (our hypothetical evil Congress would argue) costs substantial resources in terms of judge time, court money, and public disrespect. The dissenting judge can explain *why* s/he dissents on his or her own time, in various published contexts that are hungry for judge-written material. Although Justice Brennan might well have disagreed, the First Amendment is generally held not to require the government to subsidize publication of speech.⁶⁵ Is there some further constitutional argument that can support a right to publish dissenting opinions?

E. The Article III Argument

My brief consideration suggests that foundation for this further principle may best be drawn from the theory of scholarly literature

64. See, e.g., *Life & Fire Ins. Co. of New York v. Heirs of Wilson*, 33 U.S. 291, 302-304 (1834); *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975).

65. See *Rust v. Sullivan*, 500 U.S. 173, 192-193 (1991). Justice Brennan appears to have agreed with the court's early statement of the non-subsidization principle; at least that is the message conveyed by his lack of dissent [irony intended] from Justice Harlan's majority opinion in *Cammarano v. United States* in which Justice Douglas also endorsed the principle in concurrence. See 358 U.S. 498, 515 (1959) (Douglas, J., concurring). But Justice Brennan consistently dissented in later years from the Court's application of the principle, in the abortion-restriction cases that were relied upon for the principle in *Rust*. See 500 U.S. at 192-93. I have little doubt that Justice Brennan would advocate a stronger First Amendment position here: that the right of a judge to dissent necessarily carries with it the right to articulate precisely why.

that condemns the constitutionality of "jurisdiction-stripping" legislation. In his famous 1953 dialogue, Professor Henry Hart suggested that despite broad language in the Constitution, Congress may not act to create "exceptions" to the federal court's appellate jurisdiction that would "destroy the *essential role* of the Supreme Court in the constitutional plan."⁶⁶ Scholars have elaborated on this thesis, arguing that there is some "core" meaning to the constitutional conception of "Supreme Court" upon which Congress cannot intrude.⁶⁷

The idea that the words used in the constitution carry some contemporaneous, well-accepted core meaning which, although not detailed, was (or would have been) obvious to the constitutional Framers, and thus must be counted as a part of the Constitution's literal meaning, is a traditional one in constitutional interpretation.⁶⁸ In the Fourth Amendment area, for example, the Court has often determined the meaning of "search" or "seizure," as well as "reasonable," by reference to the state of the common law at the time of the framing.⁶⁹ Fundamental constitutional liberties have also been said to rest on the "traditions . . . of our people,"⁷⁰ and the Court has recently stressed the contemporary understanding of "sovereign immunity" in 1794 as the basis for constitutional interpretation of the Eleventh Amendment.⁷¹ This essay is not the occasion to pursue the complexities of constitutional interpretation. I simply suggest that historical traditions may support an Article III "right" for judges to issue dissenting opinions.⁷² Those who would disagree with this claim

66. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (emphasis added). Article III, § 2 of the Constitution provides broadly that "the Supreme Court shall have appellate jurisdiction . . . with such Exceptions . . . as the Congress shall make."

67. See PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 233-35 (4th ed. 1998) (collecting authorities). Low and Jeffries note that the theory is not uncontroversial; for example, Professor Martin Redish has characterized it as "constitutional wishful thinking." *Id.* at 235 & note m.

68. For a very early expression, see *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 307-08 (1803) ("it is most probable that the members of the first congress, many of them having been members of the convention which formed the constitution, best knew its meaning and true construction"). Or as Chief Justice Marshall famously asserted in 1824, "[a]ll America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 190 (1824).

69. See *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (and citing cases); *Carroll v. United States*, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . .").

70. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

71. *Alden v. Maine*, 119 S. Ct. 2240, 2244-45 (1999).

72. Professor Rebecca Brown has identified a number of contexts in which the

need to pursue an historical analysis of the practice, empirical work which, so far as I know, has simply not yet been done.

The argument is a short and simple one, at least on the first glance that this essay provides: When the Framers expressly endorsed inferior federal "courts" and "judges" in Article III, they were familiar with the late eighteenth century practice of common law judges delivering separate opinions that might not always agree, whether in the British *seriatim* style or as dissents. In fact, the practice of separate, disagreeing judicial opinions was immediately adopted by the early Supreme Court.⁷³ Thus the Framers' use of the words embodied an unarticulated, yet constitutionally enshrined, conception of "court" and "judge" that included a right to issue dissenting opinions. This interpretive argument contends that a court is not a constitutional "court," and a judge not a constitutional "judge," unless statements of dissenting rationale may be issued to accompany the majority's own opinions.⁷⁴

Supreme Court employs historical tradition as "Evidence of What is a 'Right.'" Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 200 (1993). One can subdivide this mode of analysis into "traditionalism" and "originalism." See John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1241 (1998). Originalism contends that the Constitution embodies, as a sort of "social contract," the meaning that its words had in 1787 because the Framers actually had those particular meanings in mind; traditionalism, on the other hand, "is meant to be persuasive independent of the original intent of the framers or ratifiers of the Constitution." *Id.* Perhaps the best case demonstration of these approaches appears in *McIntyre v. Ohio Elections Commission*, in which the majority simply noted the "respected tradition of anonymity" in political leafleting (which it found protected by the First Amendment), 514 U.S. 334, 343 (1995), while Justice Thomas required a demonstration of contemporaneous historical practice in 1789 to reach the same conclusion. See *id.* at 359, 370 (Thomas, J., concurring).

73. See ZoBell, *supra* note 4, at 190-91. Although Chief Justice Marshall later attempted to alter this practice in favor of unvaryingly unanimous Supreme Court opinions, his effort did not succeed, and indeed, by the end of his tenure Marshall himself had filed nine dissenting opinions. See *id.* at 193-96; Kolsky, *supra* note 4, at 2073-81. Notably, my colleague and a constitutional scholar of great note, Professor Ray Forrester, has recently called for a "return to Marshall's style," court opinions without dissents. Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 179 (1995).

74. In the course of a very different debate, some scholars have asserted that "the issuance of opinions is not an essential aspect of the judicial power." Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1328 (1996). Accord, Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126-27 (1999) ("As valuable as opinions may be . . . they are not necessary to the judicial function . . ."). But cf. Scalia, *supra* note 52, at 35-42. These assertions seem to be functional assessments of the judicial role, rather than historically-based assertions of what the judicial function was thought to comprehend in 1789. Although Professor John Harrison has noted that "[n]either the Constitution nor the Judiciary Act of 1789 provided for the delivery of written opinions," John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article*

This argument may be based not only on history but also on an ideal conception of the judicial function.⁷⁵ We can return directly to Justice Brennan's essay for the explication. First, says Justice Brennan, courts have a duty not just to "declare law" but also to "explain *why* and *how* a given rule has come to be."⁷⁶ This is a public obligation, not merely a private prerogative. If this is so—if courts have an obligation to articulate their rationales publically—then the right to dissent can be seen as an essential part of that core judicial obligation. Dissenting opinions, tethered as they are to the majority's rationale, are vital for the public to evaluate the strongest views on all sides of important judicial decisions. They are also arguably indispensable to engendering legitimate *majority* rationales. For without the prospect of published dissenting opinions—opinions to which the majority must either respond or remain silent at peril of public puzzlement—courts cannot achieve their most persuasive, and thereby most legitimate, rationales. As Justice Brennan explained: "A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated . . ."⁷⁷

The right to issue dissenting opinions can therefore be seen as

III, 64 U. CHI. L. REV., 203, 230 (1997), this silence could as likely have been predicated on the obviousness of judicial opinion writing; a negative inference is not supported, let alone required, by the historical record. Indeed, a far better source for discovering the contemporary understanding of the Framers might be Chief Justice Marshall's famous assertion: "It is emphatically the *province* and duty of the judicial department to *say what the law is*." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

75. Thus Justice Brennan, who steadfastly rejected adherence to "stagnant, archaic, hidebound" historical traditions if they did not accord with his interpretation of "the living charter that I have taken to be our Constitution," *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1988) (Brennan, J., dissenting), would give weight to the historical practice of judicial dissent, but would further ask whether that tradition is consistent with our contemporary ideal of "judge" and "court." One imagines Justice Brennan would have concluded that the lessons of history produce a happy convergence with his well-developed vision of judicial dissent.

I must also credit Josh Rosenkranz, Executive Director of the Brennan Center for Justice in New York, for suggesting yet another constitutional objection to my hypothetical "no dissents" statute: separation of powers. That is, a self-adopted court rule banning dissenting opinions might or might not be constitutional. But an order from Congress to a separate and constitutionally equal Branch, directing judicial branch officers to behave in a certain manner, could raise very different, serious constitutional questions.

76. Brennan, *supra* note 1, at 435. See also David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give reasons for their decisions—grounds of decisions that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.").

77. Brennan, *supra* note 1, at 435. Justice Brennan added: "and perhaps, in time, superseded." *Id.* However, the point that some dissents may ripen into majority opinions someday is a separate, and not necessary, justification for the right to dissent. As Justice Brennan went on to note, "[m]ost dissents never 'ripen' and do not deserve to." *Id.* at 436.

part and parcel of the constitutional conception of a federal "court."⁷⁸ Courts cannot perform fully as we want them to unless dissents exist to provide a measure for public as well as internal evaluation. Moreover (this argument goes), the right to dissent and to explain why is intrinsic to sitting as a "judge." The function of "judging" requires a right to independently report one's views to the public which the judge serves. This view is not only consistent with our received history, but can be seen as essential to the constitutional function of an independent judiciary.

Finally, what might Justice Brennan have thought of the effort to discipline Justice Kline? We cannot know with certainty, of course, for unlike Justice Kline sitting on an intermediate state appellate court, Justice Brennan expressed his views about dissents as a judge on the Supreme Court of final resort, primarily addressing a docket of "constitutional imperatives."⁷⁹ Yet the close of his essay, in which he defended his own repeated refusals to accept the majority's will regarding capital punishment, yields strong suspicion that Justice Brennan would have viewed the effort to discipline Justice Kline as illegitimate. Justice Brennan recognized, as all responsible jurists must, the "general duty . . . to acquiesce in the rulings of [one's] court and to take up the battle behind the court's new barricades."⁸⁰ Yet matters of conscience must ultimately control. There comes a point where a judge has not just the right but the duty to say "Here I draw the line."⁸¹ As for disciplining a judge for such an exercise of judicial conscience,

"None of us . . . must ever feel that to express a conviction,

78. As a state judge, Justice Kline would be fully entitled to claim First Amendment protection, *see supra* note 47. But the separate argument for dissenting *opinions*, based on an implicit meaning of Article III which describes only *federal* courts and judges, would have to find some analogy in the California State Constitution to have relevance to Justice Kline's case. However, a similar state constitutional argument is by no means implausible in California. *See, e.g.*, CAL. CONST. art VI, § 3 (providing that the State shall be divided into appellate districts consisting of "a court of appeal" staffed by "associate justices"); William Wirt Blume, *California Courts in Historical Perspective*, 22 HASTINGS L.J. 121, 173 (1970) (explaining that California's intermediate appellate courts were established by constitutional amendment in 1904). The state's supreme court justices were, of course, established in the first California Constitution of 1849. *See id.* at 127. At both of these times (1849 and 1904), the practice of judicial dissenting opinions appears to have been well-established, and I am aware of no materials to suggest that the state's constitutional drafters intended to reject that tradition in establishing their state courts.

79. Brennan, *supra* note 1, at 437; *see also supra* note 43.

80. Brennan, *supra* note 1, at 437; *accord*, Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957).

81. Brennan, *supra* note 1, at 437. This is essentially a moral, not simply judicial, assertion. As Martin Luther is reputed to have said, "Here I stand, I cannot do otherwise." ROLAND H. BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 185 (1950).

honest and sincerely maintained, is to violate some unwritten law of manners or decorum."⁸²

That a rule of judicial conduct is written, and then its general terms are interpreted to condemn "honest and sincere" expressions of judicial conscience, would not reduce the force of Justice Brennan's views on this point.⁸³ Were Justice Brennan with us today, it would surprise no one to hear him gently chide the California Commission to "let it go" and turn their attention to more threatening judicial conduct.

Conclusion

Apologies for breaking the unwritten rule that an introductory essay ought not exceed the length of the main event. The enviable succinctness of Justice Brennan's ideas leads to a perverse page ratio—his shorter essay is nevertheless more meaty than the foregoing. As for my sketch of the constitutional foundation for a judicial right to dissent, I hope the reader finds it stimulating. History, the First Amendment, and the constitutional meaning of "courts" and "judges" might all be argued to support the conception. Of course, dissent from this suggestion is your right.

82. Brennan, *supra* note 1, at 437.

83. Moreover, to interpret the judicial Canons' general language for the first time specifically to prohibit dissents such as Justice Kline's, *see supra* note 41, would raise serious constitutional notice and vagueness problems, objections that also would be near and dear to Justice Brennan's heart.